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Written statement* submitted by International Commission of Jurists, a non-governmental organization in special consultative status

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

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* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

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Universal Periodic Review of Nepal: Nepal's unfulfilled human rights obligations

Introduction

1. The International Commission of Jurists (ICJ) welcomes this opportunity to contribute to discussion of the human rights situation in Nepal, on the occasion of the adoption of its UPR outcome report by the Human Rights Council (HRC).

2. In this submission, the ICJ highlights issues concerning: i) the new Constitution and human rights obligations therein; ii) impunity and transitional justice mechanisms; iii) ongoing human rights violations during the border protests and blockade; and iv) failure to criminalize serious international crimes.

3. The submission notes continued non-implementation by the Government of Nepal (GoN) of international obligations relevant to many of the recommendations received during the current UPR cycle, including many that the GoN asserts are "already implemented or in the process of implementation", and others that are similar to recommendations Nepal already received during the 2011 UPR. It concludes with specific calls for further acceptance and implementation of the recommendations by GoN.

i) The new Constitution and human rights obligations

(Recommendations: supported 121.2, 121.16; supported "already implemented or in process" 122.2, 122.3, 122.67, 122.68, 122.69, 122.70)[1]

4. The new Constitution promulgated on 20 September 2015, and its first amendment endorsed on 23 January 2016, is a welcome step as it guarantees a wider range of rights, including both civil and political rights and economic, social and cultural rights, as fundamental rights. The ICJ released a detailed briefing paper in July 2015 analyzing the provisions of the draft constitution in light of Nepal's obligations under international human rights law.[2] However, some provisions of the new Constitution still do not conform to Nepal's obligations under international human rights law, including Nepali womens' right to pass on citizenship to their children as a matter of right, irrespective of the status of the father.

5. Several provisions of the Constitution improperly limit the guarantee of rights to citizens of Nepal, including right to equality (article 18), right to property (article 25), right to information (article 27), rights to clean environment (article 30), right to education (article 31), right to employment (article 33), right to health (article 35), right to food (article 36), right to housing (article 37), and right to social security (article 43). Similarly, non-citizens are not entitled to certain protections, including the right to justice (article 20) and in relation to preventive detention (article 23). Such limitations are in contravention of international human rights law; the rights in question must be extended to all persons under Nepal's jurisdiction. Furthermore, the right to constitutional remedy (article 46) does not sufficiently guarantee the right to an effective remedy and redress, including reparations, for victims of human rights violations.[3]

ii) Impunity and transitional Justice

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[1] See Report of the Working Group on the Universal Periodic Review: Nepal, UN Doc A7HRC/31/9 (23 December 2015).

[2] ICJ, *Nepal's Draft Constitution: Procedural and Substantive Concerns*, July 2015: http://icj.wpengine.netdna-cdn.com/wp-content/uploads/2015/07/NEPAL-CONSTITUTION-ADVOCACY-ANALYSIS-BRIEFS-2015-ENG.pdf

[3] ICJ, "Nepal: Constituent Assembly must urgently revise Constitution Bill to guarantee human rights", http://www.icj.org/nepal-constituent-assembly-must-urgently-revise-constitution-bill-to-guarantee-human-rights/

(Recommendations: supported 121.28; supported "already implemented or in process" 122.4, 122.5, 122.61, 122.63 and 122.64; under review 123.28)

6. The promises of truth, justice and reparation to victims of the decade-long armed conflict remain unaddressed, and impunity for serious human rights violations continues. Despite Mandamus Orders by the Courts, the police authorities continue to refuse to register FIRs in conflict-era cases. Due to lack of political will and a weak criminal justice system, those cases that have been registered by the police are not investigated. Thus, victims are systematically denied their right to effective remedy and reparation.

7. On 10 February 2015, the GoN formed two transitional justice commissions, (a truth and reconciliation commission and a commission of inquiry on disappearance) to investigate past human rights abuses. However, due to lack of the trust between the Commissions and stakeholders, including conflict victims, the commissions have failed to perform their functions one year into their two-year mandate. Moreover, the Commissions have also failed to demonstrate any willingness to engage with victims, which weakens the transitional justice process.

iii) Ongoing human rights violations during the border protests and blockade

(Recommendations: supported "already implemented or in process" 122.1, 122.44 and 122.53)

8. *Madhesh* centric parties have been demonstrating against Nepal's new Constitution in the Terai since August 2015. Protesters have been raising their concerns over the new Constitution and staged a *de facto* blockade at the main Nepal-India border posts since the Constitution was adopted. More than 50 persons, including 10 police personnel, have been killed during violent confrontations that have erupted between protesters and security forces, with allegations of excessive use of force by Nepali security forces as well as violent attacks by protesters against police personnel. Nepali authorities have failed to investigate these alleged violations, and the security forces continue to use of excessive force against protesters. While the recent talks between *Madhesh* centric parties and the GoN is a welcome step, neither side has so far made a concrete effort to end the on-going protests and violence in Terai.

9. Furthermore, the associated border blockade has had an adverse impact on the economic and social rights of the people of Nepal, including the rights to food, water and sanitation, health and adequate housing, by causing severe shortages of essential commodities such as fuel, cooking gas and essential medical supplies throughout the country.

iv) Failure to criminalize serious crimes under international law

(Recommendations: supported 121.3, 121.4, 121.15; supported "already implemented or in process" 122.62; under review 123.10, 123.11, 123.12, 123.13, 123.14, 123.15, 123.16, 123.17, 123.18, 123.19, 123.20, 123.21, 123.22, 123.26, 123.27)

10. Many serious crimes under international law are yet to be criminalized under Nepali law. The Supreme Court (SC) has, in several instances, directed the GoN to reform domestic criminal law in order to ensure that serious crimes under international law such as enforced disappearance, torture, war crimes and crimes against humanity are criminalized domestically.[4]

11. On 3 November 2014, the Ministry of Law, Justice, Constituent Assembly and Parliamentary Affairs of Nepal tabled five bills including a Bill on the Penal Code to the Legislative-Parliament. The Penal Code Bill sets out numerous reforms to the laws contained in the National Code 1963 (*Muluki Ain* 2020). Amongst the key reforms, it aims to criminalize enforced disappearance, torture and genocide. However, other serious crimes under

[4] E.g. *Rabindra Dhakal on behalf of Rajendra Dhakal v. The Government of Nepal and others*; *Rajendra Ghimire et al v. Prime Minister and Office of the Council of Ministers and others*; and *Raja Ram Dhakal v. Office of the Prime Minister and others*.

international law such as war crimes and crimes against humanity remain unaddressed in these Bills. While these are significant steps on the part of the GoN to fulfill its obligations under international law, in their current form, the bills fall short of applicable international standards in a number of respects.

v) Standing invitation to Special Procedures

(Recommendations: not supported 124.9, 124.10, 124.11, 124.12, 124.13, 124.14)

12. Visits by Special Procedures such as the Working Group on Enforced and Involuntary Disappearances, Special Rapporteur on Torture, Special Rapporteur on extrajudicial, summary or arbitrary executions, and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence, could assist the process of meeting these obligations.

ICJ Recommendations

13. The ICJ calls upon the GoN to do the following:

Further acceptance of UPR recommendations

a) Accept, among others, UPR recommendations 123.10, 123.11, 123.12, 123.13, 123.14, 123.15, 123.16, 123.17, 123.18, 123.19, 123.20, 123.21, 123.22, 123.26, 123.27, 123.28, 124.9, 124.10, 124.11, 124.12, 124.13, 124.14.

Constitution

b) Amend the constitutional provisions in compliance with international human rights law and standards;

c) Conduct genuine consultations with protesting parties, minority parties, marginalized groups and all stakeholders, in order to build trust and ownership in the Constitution and government

Transitional justice

d) Amend the TRC Act, 2014, in line with international standards and the jurisprudence of the Supreme Court of Nepal;

e) Adopt consultative processes and address victim's concerns in order that conflict victims feel ownership over the transitional justice process in Nepal;

Ongoing human rights violations

f) Ensure that security forces refrain from the use of excessive force;

g) Ensure prompt, independent and impartial investigations and bring to justice all perpetrators, whether security forces or protesters, of any unlawful killings;

Serious crimes under international law

h) Ensure that gross violations of international human rights law, including torture and enforced disappearances, as well as other serious crimes under international law, such as war crimes and crimes against humanity, are explicitly prohibited as criminal offences under domestic law and that their definition in domestic legislation is in conformity with international law.

Standing invitation to special procedures

i) Issue standing invitations to all thematic special procedures of the HRC, including the Working Group on Enforced and Involuntary Disappearances, the Special Rapporteur on Torture, Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the promotion of truth, justice, reparation and guarantees of non-recurrence.